UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

Plaintiff,

-against-

MEMORANDUM AND ORDER
05 - CV - 3212

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, et al.,

Defendants.

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GLASSER, United States Senior District Judge

Various defendants in this civil RICO action have objected, pursuant to Federal Rule of Civil Procedure 72(a) ("Rule 72(a)"), to the Order of Magistrate Judge Pohorelsky, issued on May 22, 2007 ("May 22 Order"), lifting a stay of testimonial discovery that had been imposed on February 22, 2006. The May 22 Order was largely based on Magistrate Judge Pohorelsky's speculation, upon a cursory reading of the voluminous papers filed by several defendants in support of their motions to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) or for summary judgment pursuant to Federal Rule of Civil Procedure 56, that at least some portions of the Government's claims would survive the Defendants' motions, and that the interests of justice were therefore best served by permitting testimonial discovery to go forward. For the reasons stated below, this Court finds the May 22 Order to be clearly erroneous, and therefore sustains the Defendants' objections to that Order. The Court further directs that the stay of discovery is to remain in place until this Court has disposed of the various pending motions to dismiss the Amended Complaint or for summary judgment.

BACKGROUND

This is a civil RICO action in which the Government alleges that the Defendants, who collectively include the International Longshoremen's Association, AFL-CIO ("ILA"), various ILA Districts and local chapters, various members of the ILA Executive Board, an employer association and several employee benefit funds, and various individuals alleged to be affiliates of the Gambino and Genovese families of La Cosa Nostra, conspired to violate two subsections of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(b) and (d), by engaging in a pattern of racketeering activity designed to further the interests of organized crime along the waterfront areas of the Ports of New York, New Jersey, and Miami.[1] The Court need not recite the lengthy and complex factual allegations underlying the Government's civil RICO claims as alleged in the Amended Complaint for purposes of resolving the Defendants' objections to Magistrate Pohorelsky's discovery order. A brief survey of the procedural history of this case is sufficient to illuminate the issue presently before the Court.

This action was commenced on July 6, 2005, and shortly thereafter was stayed by consent of the parties pending the outcome of the trial in United States v. Coffey, 04-CR-651, a criminal RICO action then pending before this Court that involved many of

[1] Notably, several of the Defendants, including the ILA and twenty-four of its individual Vice Presidents, the Management-International Longshoremen's Association Managed Health Care Trust Fund ("MILA") and its Board of Trustees, and the Metropolitan Marine Maintenance Contractors Association, Inc. ("METRO") and several of its associated employee benefit funds, are identified in the Amended Complaint as "nominal" defendants– parties whom the Government does not allege are liable for any RICO violation, but are included as Defendants in this action because their presence is necessary for effectuating the broad equitable relief that the Government seeks.

the same defendants and issues as this action.[2] The Coffey trial ended in November 2005, and the government filed an Amended Complaint on February 21, 2006. The next day, following a status conference with the parties, Magistrate Judge Pohorelsky issued an order permitting document discovery to go forward, but staying testimonial discovery indefinitely, pending the outcome of the parties' contemplated motions to dismiss the Amended Complaint.[3] See Ex. A (Transcript of February 22, 2006 hearing before Magistrate Judge Pohorelsky regarding stay of discovery "(May 22 Tr.")), Ex. B (Minute Order of Magistrate Judge Pohorelsky dated February 22, 2006 (docket no. 57)). At the status conference in which he granted the initial stay, Magistrate Judge Pohorelsky observed that, particularly given the number of parties and attorneys involved in this complex action, discovery would be a "pretty costly enterprise" that the Defendants– including the nominal Defendants– "would have to bear pointlessly" if the case were ultimately dismissed on the pleadings. May 22 Tr. at 19. The parties' motions to dismiss or for summary judgment were filed in May 2006, and the Government's opposition brief was filed in December of that year, followed by the parties' reply briefs in May 2007.[4] On at least two instances, at status conferences held before Magistrate

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[2] See Nominal Defendant International Longshoremen's Association, AFL-CIO's Objection to the Magistrate Judge's May 22, 2007 Order Lifting the Stay of Deposition Discovery (docket no. 257) ("ILA Mem.") at 2 n. 1. The Court notes that no formal stipulation or order staying this action appears on the case docket, but very few entries appear on the docket between July and December 2005, which is consistent with the ILA's uncontroverted assertion that a stay was in effect at that time.

[3] Magistrate Judge Pohorelsky subsequently permitted the deposition de bene esse of Government witness George Barone, due to concerns about Mr. Barone's health. Barone's deposition was taken over a period of several days in June 2006.

[4] Only Defendant Robert E. Gleason filed a motion for summary judgment, which was withdrawn at oral argument. Thus, the only motions that remain pending are the parties' motions to dismiss the Amended Complaint pursuant to Rule 12(b)(6), or to strike certain allegedly "impertinent or scandalous matter" from the Amended Complaint pursuant to Rule 12(f).

Judge Pohorelsky on June 6, 2006, and March 16, 2007, the Government moved to lift the stay of deposition discovery; both motions were denied. At the May 22, 2007, status conference, after the defendants' reply briefs had been submitted, the Government renewed its efforts to lift the stay yet again. Magistrate Judge Pohorelsky granted the Government's renewed request, basing his decision in large part upon his "impression having reviewed the complaint [] that enough of these claims are going to survive a motion to dismiss that it doesn't make sense for us to hold off on discovery." May 22 Tr. at 59:16-19. Magistrate Judge Pohorelsky conceded that he had not "stud[ied]"[5] the parties' motion papers, but had "looked at"[6] them without "analyzing"[7] the issues presented "with [] care."[8] He further informed the parties that they were "free to appeal [his] ruling" to this Court, which is "probably in a better position to determine this." Id. at 59:13-14; see also id. at 62:10 ("You can take [the discovery ruling] up with Judge Glasser."). Several defendants entered timely objections to the May 22 Order, arguing that the order is clearly erroneous in that it threatens to impose substantial discovery costs on the members and beneficiaries of the union and ERISA fund defendants, as well as the various individual defendants, which may be unnecessary if the Court dismisses the Amended Complaint as to all or some of the defendants.

DISCUSSION

Rule 72(a) provides that a party may file an objection to a magistrate judge's

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5 Id. at 59:6.

6 Id.

7 Id. at 62:4.

8 Id.

ruling on a non-dispositive motion with the district judge overseeing the case, who shall "consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." The Rule imposes a "highly deferential standard of review," Lyondell-Citgo Refining, LP v. Petroleos de Venezuela, S.A., No. 02-CV-795, 2005 WL 551092, at *1 (S.D.N.Y. March 9, 2005), pursuant to which "the magistrate judge's findings should not be rejected merely because the court would have decided the matter differently. Rather, the district court must affirm the decision of the magistrate judge unless the district court on the entire evidence is 'left with the definite and firm conviction that a mistake has been committed.'" Nielsen v. New York City Dep't of Educ., No. 04-CV-2182, 2007 WL 1987792, at *1 (E.D.N.Y. July 5, 2007) (Garaufis, J.).

Even under the deferential standard applied to non-dispositive motions under Rule 72(a), this Court is left with the "definite and firm conviction" that the May 22 Order was erroneously decided. Factors that a court should consider in deciding whether to grant a stay of discovery pending the disposition of a dispositive motion include: (1) the breadth of the discovery sought and the burden of responding to it; (2) the strength of the pending dispositive motion; (3) the nature and complexity of the action; (4) the posture or stage of the litigation; and (5) whether and to what extent the party seeking discovery will be prejudiced by further delay. See Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd., 206 F.R.D. 367, 368 (S.D.N.Y. 2002); Telesca v. Long Island Housing Partnership, Inc., 05-CV-5509, 2006 WL 1120636, at *1 (E.D.N.Y. April 27, 2006) (Boyle, Mag. J.). Virtually all of these factors weigh in favor of preserving the stay in this case. The potential testimonial discovery to be taken in this action is very broad; the ILA asserts in its brief, and the Government does not dispute, that the Government alone has identified more than ninety prospective witnesses. ILA Mem. at 7. The expenses incurred in preparing for and attending so many depositions would clearly be enormous. Moreover, this action is extremely complex, with forty-two defendants and an Amended Complaint of 255 paragraphs in 76 pages plus eight pages of demands for relief plus 434 pages of exhibits pleading a complicated set of factual allegations about the influence of organized crime on the Waterfront stretching back for decades,[9] to say nothing of the extremely complex legal issues inherent in the RICO statute itself. Moreover, although this action has been pending for approximately two years, relatively little pre-trial work has yet occurred. Finally, and perhaps most importantly, having only yesterday heard a day-long oral argument on the Defendants' various motions to dismiss the Amended Complaint, the Court can say confidently that, although it is not yet ready to issue a ruling on those motions and does not anticipate being ready to do so in the immediate future, the challenges raised in the Defendants' motions, particularly with respect to the pleading of the RICO enterprise and the necessary predicate acts, are substantial. If the Court ultimately determines that the Amended Complaint fails to adequately allege the existence of a cognizable association-in-fact enterprise or to adequately plead the requisite predicate acts, it would likely be compelled to dismiss the Amended Complaint in its entirety. In light of these circumstances, the Court finds that a continued stay of discovery is appropriate. See

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[9] Although, as the Court noted at oral argument on the motions to dismiss, it questions the relevance of many of the factual allegations in the Amended Complaint that antedate the inception of the alleged RICO conspiracy in 1995, those issues would obviously need to be explored if testimonial discovery were to take place before this Court has issued a decision on the pending motions to dismiss the Amended Complaint or strike the allegedly extraneous historical allegations.

Prosperity Partners, Inc. v. Bonilla, 374 F.Supp.2d 290 (E.D.N.Y. 2005) (Boyle, Mag. J.); Chrysler Capital Corp. v. Century Power Corp., 137 F.R.D. 209 (S.D.N.Y. 1991).

It is of course true, as the Government points out, that "discovery should not be routinely stayed simply on the basis that a motion to dismiss has been filed," but it is not the "routine" case in which the Government seeks to cause substantial discovery costs to be incurred by a group of "nominal" Defendants– comprised of labor unions, not-for-profit employee-benefit funds, and individuals– who are not alleged to have violated any law. Moran v. Flaherty, No. 92-CV-3200, 1992 WL 267913, at *1 (September 25, 1992) (emphasis added). As counsel for the Government emphasized in the oral argument on the motions to dismiss the Amended Complaint, the true victims of organized crime activity on the Waterfront are the members of labor unions such as the ILA and beneficiaries of ERISA funds such as the METRO-ILA Funds– the very individuals who will ultimately bear the substantial costs of taking testimonial discovery of dozens of witnesses. The fact that many of the Defendants who would bear the cost of testimonial discovery are non-profit organizations funded by Waterfront laborers, and are named in the Amended Complaint only as "nominal" defendants that are not alleged to have violated RICO in any way, counsels greater caution in imposing significant discovery costs on the Defendants in this case than would apply in the "routine" civil action. See Telesca, 2006 WL 1120636, at *2 (stay of discovery appropriate in "a complex case that involves six defendants, including two towns, two not-for-profit corporations, and a state agency," all of which "will necessarily incur substantial expenses if and/or when discovery is conducted."). Taken together with the substantial issues regarding the viability of the pleadings in the Amended Complaint, the Court finds that the

Defendants have satisfied their burden of making a "strong showing of good cause" for staying discovery until the pending motions to dismiss have been resolved. Howard v. Galesi, 107 F.R.D. 348, 350 (S.D.N.Y. 1985); see Federal Rule of Civil Procedure 26(c).

In opposing the Defendants' objections to the May 22 Order, the Government asserts, inter alia, that it will suffer prejudice from further delay caused by the tendency of passing time to erode the memories of prospective witnesses, arguing that "[t]his is particularly true here, where a number of witnesses in this case are of advanced age, and accordingly any delay in the proceedings carries with it the increased risk that their testimony may not be obtained." United States of America's Memorandum of Law in Opposition to Defendants' Rule 72 Objections to the Decision of the Honorable Viktor V. Pohorelsky, United States Magistrate Judge, Lifting the Stay of Testimonial Discovery in this Action ("Gov. Mem.") at 13. This potential source of prejudice to the Government's case does not justify lifting the stay of testimonial discovery in its entirety. Indeed, the procedural history of this action demonstrates that the Government's concern may be accommodated by less drastic measures. As was the case with George Barone, the Government is free to request the right to take depositions de bene esse of any witnesses about whom it can demonstrate a good-faith need for expedited discovery in light of age, health, fading memory, or any other sufficiently compelling circumstance, and nothing in this order shall be deemed to preclude such a request if Magistrate Judge Pohorelsky, in his discretion, finds such an accommodation to be warranted under the circumstances.

CONCLUSION

For the foregoing reasons, the Defendants' objections to Magistrate Pohorelsky's

May 22 Order lifting the stay of discovery in this action are hereby SUSTAINED. It is further ordered that the stay of discovery shall remain in place until this Court has decided the parties' motions to dismiss the Amended Complaint. As noted above, if the Government can show good cause on an individualized basis for taking the depositions of specific witnesses in the immediate future, Magistrate Pohorelsky may entertain such requests in his discretion.

SO ORDERED.

Dated: Brooklyn, New York
August 1, 2007

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I. Leo Glasser
United States Senior District Judge

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